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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL P. GRACE,
Petitioner,

v.

SANTA FE PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENT SANTA FE PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted and applied to the facts of this case this Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968), that arbitrators are required to disclose past business relationships with parties to an arbitration.

2. Whether the decision of the Court of Appeals was in accord with interpretations and applications of the *Commonwealth Coatings*, *supra*, ruling by other courts of appeals.

3. Whether Petitioner had a constitutional due process right to an evidentiary hearing on a claim of evident partiality of an arbitrator based upon a contention that the arbitrator possibly had a tenuous, trivial, indirect and insubstantial relationship with the attorneys for one of the parties to the arbitration.

4. Whether Petitioner may question for the first time in his Petition the correctness of District Court rulings pertaining to (a) stay of litigation pending arbitration; (b) permitting discovery in aid of arbitration; (c) requiring the matter to proceed to arbitration after nearly two years of delay by Petitioner; and, (d) ordering dismissal of a second arbitration demand by Petitioner in California on the ground of *res judicata*.

5. Whether the decision of the arbitration panel, confirmed by the District Court and the Court of Appeals, holding that Petitioner had failed to achieve production of uranium in commercial quantities constituted a condemnation of solution mining.

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T. Greene, Conveyancing Problems in Uranium Mining Rights, 5 Utah L. Rev. 29 (1956)	26
Meyers, Habendum Clauses in Term Mineral and Royalty Deeds, 6 Rocky Mountain Mineral Law Institute, 551 (1961)	27
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BRIEF OF RESPONDENT SANTA FE PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Santa Fe Pacific Railroad, respectfully prays that the Court deny Petitioner's request that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 4, 1982, and the Order denying Petitioner's Motion for Rehearing entered on February 23, 1982.

OPINIONS BELOW

See Petition for Writ of Certiorari.

JURISDICTION OF THIS COURT

See Petition for Writ of Certiorari.

STATUTES INVOLVED

A. Federal Arbitration Act, 9 U.S.C. §§ 3, 9 (*see* Appendix for text).

B. New Mexico Arbitration Act §§ 44-7-2(B), 7, 12 (A)(2), 16 N.M.S.A. (1978 Comp.) (*see* Appendix for text).

STATEMENT OF THE CASE

In order to correct inaccuracies and ommissions contained in Petitioner's Statement of the Case, Respondent is hereby submitting its own Statement of the Case with appropriate references to the record, as follows:

In 1968, Respondent determined to offer for lease at auction certain mineral properties owned by it. (R. XI, 1140-46). Petitioner, who had a number of years experience in mineral exploration, was the successful bidder on options covering several of these properties. (R. X, 925-26). The options permitted Petitioner to explore the optioned property for uranium and, thereafter, to enter into uranium mining leases. (R. XI, 1144, 1155, 1158). Petitioner ultimately elected to lease several parcels from Respondent under five separate uranium leases. The leases allowed the Petitioner one year for exploration activities and an additional three years to conduct mining operations. He was required to furnish periodic reports of activities to Respondent. The leases prohibited Petitioner from subjecting the properties to any liabilities or liens. If, at the expiration of a lease, Petitioner was producing uranium-bearing ore in commercial quantities from the leased premises, the Respondent was obligated to renew the lease for an additional three years. (R. I, 131).

During the lease terms, Petitioner failed to furnish the required geologic and exploration reports to Respondent, and allowed the accumulation and filing of liens against the properties totalling $404,533.93. (R. I, 3, 78; II, 280, 312, 341). Despite his failure to furnish required reports, Petitioner did perform exploration work on the

leased premises on an intermittent basis. (R. XIV, 1880-81, 1915). While this exploration revealed the presence of uranium mineralization on some of the leased properties, no "ore body", as that term is defined in the industry, was ever discovered on any of the properties.[1] (R. XIII, 1685-86; XIV, 866-67, 1898; XV, 1929). Therefore, contrary to the assertion in the Petition (p. 3), Petitioner did not discover any "substantial uranium reserves" on the leased properties.

As the expiration dates of the leases approached, Petitioner began desperate attempts at "mining operations" to convince the Respondent that he had achieved commercial production. These attempts included some pit mining on one property and "in situ" or "solution mining" projects on two other parcels. (R. XIV, 1933-34, 2083-84; IX, 735-36; XV, 2038-40; VII, 318; XIII, 1675-78; XIV, 1862, 1867). Solution mining is a process whereby chemicals are injected into the mineral-bearing strata, allowed to remain there for a time and then pumped to the surface, with the objective being to recover U_3O_8 (yellowcake) from processing uranium suspended in solution.[2] (*Ibid*). This process was not permitted by Respondent and was considered to be an inappropriate method of mining that was possibly injurious to the property. (R. IX, 735-36; XV, 2038-40). These solution mining projects were considered by the Petitioner himself as being "pilot" or "experimental". (R. X, 982). They had an "air of improvisation and haphazardness." (R. XIII, 1668-69). The operations produced a total of 178 pounds of uranium having a market value of less

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[1] "Ore" is defined in the industry as mineral of sufficient quantity and grade to permit mining at a profit—producing at least enough income to cover expenses of operation. (R. VI, 164; VIII, 551; XIII, 1681). Thus, the existence of uranium mineralization does not necessarily indicate "ore" or an "ore body."

[2] "Yellowcake" is not produced directly by "in situ" mining operations as claimed at p. 3 of the Petition.

than $5,000 as against operating costs in excess of $70,000. (R. XIII, 1675-78; XIV, 1862, 1867). Expert testimony established that this did not qualify as commercial production and would never have resulted in such production. (R. XIII, 1678; XIV, 1867). Petitioner's operation was so slipshod that he even failed to obtain the requisite New Mexico license to conduct mining operations although his consultants had advised him to do so. (R. VI, 120-25; R. XV, 2084).

Nevertheless, prior to the expiration dates of the leases, Petitioner attempted to renew them, contending that he had achieved production of uranium-bearing ore in commercial quantities. (R. XI, 1211-13). Respondent thereupon hired an independent mining consultant to review Petitioner's activities, study the properties and render a report on whether production in commercial quantities had been achieved on any of them. (R. XI, 1214). The consultant's report was that such production had not been achieved and Petitioner was notified that the leases had expired.

Shortly thereafter, in 1976, five exploration companies filed suit in the United States District Court for the District of New Mexico to foreclose mechanics' liens on properties leased by the Petitioner from Respondent and on which the Petitioner had ordered mineral exploration. (R. I, No. 1). The suits named the Respondent as a defendant and sought to foreclose the interests of both Petitioner and Respondent. Respondent filed an original and, later, an amended crossclaim against Petitioner seeking a determination that all rights of Petitioner in the leased properties had terminated by reason of failure to achieve production in commercial quantities and various breaches of the lease terms. Petitioner thereupon filed a demand for arbitration with the American Arbitration Association, seeking to have the leases declared valid and in full effect. (R. I, 184). On motion of the Petitioner, the District Court stayed proceedings on the crossclaim pending arbitration. (R. II, 276).

Pursuant to the rules of the American Arbitration Association, Petitioner and Respondent each nominated an arbitrator and the Association proposed a neutral arbitrator, Dr. Jack T. Mommsen ("Mommsen"), after numerous delays occasioned by Petitioner and his counsel. (R. III, 717). Respondent accepted the proposed arbitrator but Petitioner requested additional time for consideration and contacted Mommsen directly to inquire into his background. (R. III, 724). Mommsen sent a letter to Petitioner's attorney setting forth his educational and work background. (R. III, 610-14). The letter was never sent to Respondent or its counsel, the Modrall law firm. (R. III, 725). The resume showed Mommsen to be a chemist, mechanical engineer and economist by education, a consultant in the field of nuclear energy since 1960 and employed by some 25 public and private entities. Among his clients were General Atomic Company ("General Atomic") and Texas Eastern Nuclear. General Atomic is a partnership of Gulf Oil Corporation ("Gulf") and Scallop Nuclear Corporation. Texas Eastern Nuclear is a subsidiary of Texas Eastern Corporation. (R. II, 724). Texas Eastern Corporation also has another subsidiary by the name of Transwestern Pipeline Company. At the time the resume was transmitted to Petitioner's counsel, it was a matter of common knowledge that Gulf was planning on mining uranium ore on a property adjacent to one of the properties leased by Petitioner from Respondent.

The property which Petitioner had adjacent to the Gulf property was referred to as the "Section 25" property. As a matter of fact, Gulf had approached Petitioner prior to expiration of his lease to discuss a mining arrangement on the Section 25 property, which proposal Petitioner rejected. (R. X, 943; XI, 1161-62). Following expiration of the Petitioner's lease on the Section 25 property, Petitioner entered into an arrangement with a third party, Richard Bokum, whereby, if Petitioner was able to secure an arbitration award reinstating the Sec-

tion 25 lease, it would be assigned to Bokum who, in turn, was committed by contract to offer it to Gulf. (R. IX, 667-70, 715; XI, 1252-53).

After contacting Mommsen directly, and receiving his resume, Petitioner accepted Mommsen as the neutral arbitrator. There were then further delays occasioned by Petitioner's reluctance to move forward with the arbitration. However, the matter finally culminated in a two and one-half week evidentiary hearing. (R. III, 717). The decision of the arbitration panel, with the Petitioner's nominee dissenting, was adverse to Petitioner. (R. III, 516-20). On July 3, 1979, Respondent moved to confirm the arbitration award. (R. II, 516). Petitioner moved to vacate the award pursuant to § 44-7-12(A)(2) N.M.S.A. (1978 Comp.), on the ground of evident partiality of the neutral arbitrator. (R. III, 549). Among the facts alleged were that:

(1) Mommsen had consulted for General Atomic and General Atomic was represented by Respondent's attorneys, the Modrall law firm, albeit on unrelated matters;

(2) Mommsen had consulted for Texas Eastern Nuclear and the Modrall law firm represented a sister corporation, Transwestern Pipeline Company; and,

(3) Mommsen was being considered as an arbitrator in a matter involving Homestake Mining Company, which was a client of the Modrall law firm.

On April 1, 1980, the District Court denied the Motion to Vacate Arbitration Award and confirmed the award. Following that order, in an attempt to correct a misimpression in the mind of the District Court, the Modrall law firm filed an affidavit apprising the court that one of the attorneys who had worked for General Atomic knew of Mommsen and that Mommsen had been retained as a consultant for General Atomic, although he had never had any personal contact with Mommsen. Following the affidavit and a spate of new motions by Peti-

tioner, the District Court entered another opinion on May 15, 1980, supplementing, but not changing, the April 1st opinion. On May 23, 1980, the District Court entered a Judgment confirming the arbitration award. (R. III, 768). Petitioner then appealed to the United States Court of Appeals for the Tenth Circuit. (R. III, 786). The Court of Appeals affirmed the decision of the District Court on January 4, 1982.

ARGUMENT FOR DISALLOWANCE OF THE WRIT

Summary of Argument

A. This is a case involving an effort by Petitioner to vacate an arbitration award on the ground of evident partiality on the part of a neutral arbitrator in a commercial arbitration. The arbitrator disclosed his business and educational background to the Petitioner prior to his selection as arbitrator. The neutral arbitrator had no prior business dealings with either of the parties to the arbitration or their attorneys. The record disclosed only that, at different times, and on different matters, the neutral arbitrator had consulted for General Atomic, which was represented by Respondent's attorneys. It also disclosed that the neutral arbitrator consulted for Texas Eastern Nuclear and the Respondent's attorneys had represented a sister corporation of Texas Eastern Nuclear. Finally, the neutral arbitrator was being considered as an arbitrator on a matter involving Homestake Mining Company, also represented by Respondent's attorneys. There was no evidence that Respondent's attorneys ever had any contact with the neutral arbitrator; nor that the neutral arbitrator knew of the clients represented by Respondent's attorneys; nor that Respondent's attorneys knew, at the time of his selection, of the neutral arbitrator's clientele. Therefore, there was no prior business relationship of any kind between the neutral arbitrator and the Respondent or Respondent's attorneys. The neutral arbitrator's connection, if any, with the Respondent's attorneys was, at best, indirect, trivial and insubstantial.

As a consequence, the neutral arbitrator did not breach any duty of disclosure created by this Court in *Commonwealth Coatings Corp. v. Continental Casualty Co., supra*, and the ruling of the United States Court of Appeals upholding the arbitration award was completely in accord with that decision.

B. There is no conflict in the circuits over application of this Court's ruling in *Commonwealth Coatings Corp. v. Continental Casualty Co., supra*. It is clear under that case that an arbitrator must disclose prior business dealings with the parties to an arbitration. By interpretation, the rule has been extended to include prior business dealings with attorneys for the parties. In this case, the neutral arbitrator never had any business dealings with either party to the arbitration or their attorneys. He completely disclosed to Petitioner his educational and business background, and was accepted by Petitioner. Under the circumstances, there was no basis for vacation of the arbitration award under the *Commonwealth Coatings* decision.

C. Petitioner claims that, because the neutral arbitrator and the Respondent's law firm had one common client and other clients that had corporate ties to one another, albeit on totally unrelated matters, an evidentiary hearing might "possibly" have revealed some business connection between the arbitrator and the Respondent's law firm. The Court of Appeals correctly held that the possibility of such a tenuous and indirect relationship was not sufficient to justify an evidentiary hearing on Petitioner's motion to vacate arbitration award. Furthermore, an evidentiary hearing on a motion to vacate an arbitration award is a matter within the discretion of the trial court and not a matter of right. Therefore, Petitioner did not suffer any denial of due process.

D. Petitioner's arguments under Point III are all new issues not raised in the District Court or Court of Appeals. In them, Petitioner seeks to question the correct-

ness of District Court rulings staying litigation pending arbitration; permitting discovery in aid of arbitration; requiring the matter to proceed to arbitration after nearly two years of delay caused by Petitioner; and, ordering dismissal of a second arbitration attempt by Petitioner in California on the ground of *res judicata*. Not having raised these issues previously, Petitioner is not entitled to have them reviewed by certiorari. Furthermore, the rulings were correct. Staying the litigation pending arbitration is specifically permitted by the federal and state arbitration statutes. Discovery was permitted pursuant to a written stipulation by Petitioner. Petitioner did not object to the District Court requiring the matter to proceed to arbitration after a two year delay nor did he request a continuance. And, all of the issues which Petitioner attempted to raise in the California arbitration had already been determined in the New Mexico arbitration.

E. Petitioner claims that the District Court and the Court of Appeals condemned solution mining as a production technique. This is not correct. The arbitration panel decided that Petitioner's rights under the leases with Respondent had terminated because he had not achieved production in commercial quantities. The District Court and the Court of Appeals confirmed this decision. That action did not condemn solution mining in any manner.

I. THE COURT OF APPEALS CORRECTLY INTERPRETED AND APPLIED THIS COURT'S PREVIOUS DECISION IN COMMONWEALTH COATINGS.

Petitioner has attempted to persuade the Court that the decision of the Court of Appeals was somehow in conflict with this Court's decision in *Commonwealth Coatings, supra*. That can only be determined in the context of the claims raised by the Petitioner. As stated by the Court of Appeals, Petitioner has contended that:

(1) Mommsen consulted for General Atomic and the Modrall law firm, Respondent's attorneys, represented General Atomic;

(2) Mommsen consulted for Texas Eastern Nuclear, a subsidiary of Texas Eastern Corporation, and the Modrall law firm represented Transwestern Pipeline Company, another subsidiary of Texas Eastern Company; and,

(3) Mommsen was being considered as an arbitrator on a case involving Homestake Mining Company, another client of the Modrall law firm.

The record before the Court of Appeals established that, with regard to the one common client, General Atomic, Mommsen and the Modrall law firm represented that company on unrelated matters. Mommsen and the Modrall law firm never had any business dealings or contact with one another. At most, one member of the Modrall law firm, who did not work on this case, was aware of Mommsen's retention by General Atomic but never had any contact with him.

Petitioner now contends that Mommsen somehow violated the disclosure standard of *Commonwealth Coatings* and that the Court of Appeals somehow misinterpreted that case in reviewing the District Court's denial of the Motion to Vacate Arbitration Award. To this, the Petitioner has added a new argument, raised for the first time in this Petition for Writ of Certiorari, to the effect that Mommsen should have advised Petitioner that General Atomic was a partnership between Gulf and Scallop Nuclear, because of Gulf's interest in the Section 25 property and subsequent acquisition of that property. Neither of these assertions, however, is meritorious or justifies the granting of a Writ of Certiorari.

The Petitioner correctly analyzed the gist of the *Commonwealth Coatings* decision in stating that this Court held that an arbitrator has a duty to disclose past financial dealings with a "party" notwithstanding the ab-

sence of evidence of fraud or bias. (Petition, p. 7). To that extent, this Court may have created a "per se" rule. However, that avails the Petitioner nothing since Mommsen never had any financial dealings with either of the parties to the arbitration. He did disclose all of his other dealings in the uranium business and, therefore, there was no violation of the disclosure requirement of *Commonwealth Coatings*.

Following *Commonwealth Coatings*, in *Sanko S.S. Co. v. Cook Ind., Inc.*, 495 F.2d 1260 (2d Cir. 1973), the United States Court of Appeals for the Second Circuit extended the disclosure requirement of *Commonwealth Coatings* to include disclosure by an arbitrator of past dealings with the attorney for a party to an arbitration. Assuming that this Court would endorse the *Sanko* extension, the Court of Appeals correctly interpreted and applied both decisions to the facts of this case. Since Mommsen never had any business dealings with the Modrall law firm either, he did not violate the extended disclosure requirement.

The Petitioner seeks to impose some additional disclosure requirement on Mommsen based upon the facts that he and the Modrall law firm had one common client (General Atomic); that both did work for separate subsidiaries of the same corporate parent (Texas Eastern Corp.); and, that another client of the Modrall law firm (Homestake Mining Co.) was involved in an arbitration in which Mommsen was being "considered" as an arbitrator. The Petitioner suggests that there was something sinister about the foregoing, ignoring that tenuous connections such as these would be expected given the facts that Mommsen is an expert in the nuclear energy business and that the Modrall law firm represents companies engaged in that business. Nevertheless, assuming the existence of such "facts", there was still nothing for Mommsen to disclose either factually or legally under the *Commonwealth Coatings* decision.

Factually, Mommsen could not have disclosed the Modrall law firm's clientele since he had no way of knowing which of his clients the Modrall law firm might have represented. He had never dealt with the Modrall law firm and any knowledge on his part of common clientele would be sheer coincidence. Since he apparently had no knowledge of any of the relationships of which the Petitioner complains, there was nothing that he could have disclosed under the circumstances.

Furthermore, even if Mommsen had been aware that the Modrall law firm had a client in common with him, or the other associations asserted, such connections were so tenuous, trivial and insubstantial as to be beyond the scope of any disclosure requirement of *Commonwealth Coatings*. In *Commonwealth Coatings*, in his concurring opinion, Mr. Justice White stated:

> ". . . The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. . . . This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or *if they are unaware of the facts but the relationship is trivial*. . . .
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> * * * *
>
> . . . [A]n arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. . . ." (Emphasis added.)

89 S.Ct. at p. 340. Following that language, in *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548 (2d

Cir. 1981), *cert. den.*, 451 U.S. 1017, (1981), the United States Court of Appeals for the Second Circuit held that a mere appearance of bias does not equate with the evident partiality necessary to vacate an arbitration award and refused to do so where the neutral arbitrator in one arbitration appeared as an expert witness in another arbitration for one of the law firms involved in the first arbitration. Similarly, in *United States Wrestling Fed. v. Wrestling Division of the AAU, Inc.*, 605 F.2d 313 (7th Cir. 1979), the United States Court of Appeals for the Seventh Circuit held that *Commonwealth Coatings* did not require an arbitrator to disclose insubstantial and trivial relationships, adopting as a "guiding principle" that:

> The interest or bias of an arbitrator must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative."

605 F.2d at p. 318. Finally, in *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196 (7th Cir. 1980), *cert. den.*, 449 U.S. 873, (1980), the Seventh Circuit again held that the *Commonwealth Coatings* decision requires an arbitrator to disclose only significant connections with a party to an arbitration, particularly where the possibility of bias is highly speculative. This Court refused to grant certiorari in the *International Produce* and *Tamari* cases. Consequently, under *Commonwealth Coatings*, as interpreted by at least two circuits, even if Mommsen had been aware of the Modrall law firm connection with a couple of his clients, he would have been under no duty to disclose that connection because of its tenuous, trivial and insubstantial nature.

Petitioner's further attempt to raise a new issue, *viz.*, Mommsen's alleged duty to disclose Gulf's partnership interest in General Atomic, is also inappropriate. Even if Petitioner is entitled to raise the issue for the first time on a Petition for Writ of Certiorari, the assertion has little merit. Given the fact that the ownership of Gen-

eral Atomic was a matter of common knowledge in the uranium industry, it is difficult to believe that Petitioner was unaware that Gulf was one of the partners in the venture. However, regardless of that, Gulf's ownership interest in General Atomic, a client of Mommsen, hardly creates even an appearance of bias in this case simply because Gulf ultimately acquired the Section 25 property after Petitioner's interest was terminated. There is nothing in the record to suggest that Mommsen ever worked for Gulf, or had any relationship with Gulf by which he would have profited from Gulf's acquisition of the Section 25 property. Furthermore, the Petitioner's implication that Mommsen favored Respondent's position in the arbitration because of some desire to assist Gulf in obtaining the Section 25 property is simply a misrepresentation of the facts. The evidence during the arbitration proceeding showed that Petitioner had made a deal with Richard Bokum, a uranium entrepreneur, whereby the Section 25 property had been assigned to him contingent upon Petitioner's succeeding in the arbitration. Bokum, in turn, had a contractual commitment to offer the Section 25 property to Gulf if he acquired it. (R. IX, 667-70, 715; XI, 1252-53). Consequently, if Petitioner's theory is that Mommsen somehow wanted to benefit Gulf, then the easiest way for him to have done so would have been to rule in Petitioner's favor. As a matter of fact, Mommsen was not interested in Respondent's plans for the leased property and thought that such plans were irrelevant to the arbitration. (R. XII, 1322).

In summary, Mommsen revealed all the information he was required to reveal under the *Commonwealth Coatings* decision and other courts of appeals cases interpreting that decision. He never had any business relationship whatsoever with either the Respondent or the Respondent's attorneys, and his connection with the Respondent's law firm was, unbeknownst to him, trivial and insubstantial. There was nothing about it which he either could, or should have revealed. The eleventh hour claim

that Mommsen had a duty to disclose that his client, General Atomic, was partially owned by Gulf, is not only too late but has no merit since the implication that Mommsen showed favoritism to Respondent in order to benefit Gulf is simply untrue under the facts of the record. The Court of Appeals did not, therefore, misinterpret the *Commonwealth Coatings* decision, nor is there any conflict in the circuits over such interpretation.

II. PETITIONER HAD NO DUE PROCESS RIGHT TO AN EVIDENTIARY HEARING AND THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner claims, in the caption of this portion of his Petition, that his right to due process of law was violated in the denial of an evidentiary hearing on the conduct of the arbitration proceeding and the adequacy of Mommsen's disclosure. (Petition, p. 10). The adequacy of disclosure was discussed under the previous point. The assertion pertaining to conduct of the arbitration proceeding relates to an affidavit by the dissenting arbitrator that he was excluded from the deliberative process. With respect to this claim, the Court of Appeals adopted the finding of the District Court. The District Court noted that the dissenting arbitrator's affidavit was disputed by a counter-affidavit but, for purposes of resolving the issue, assumed the dissenting arbitrator's assertions to be true. Nevertheless, they showed absolutely no evidence of exclusion of the arbitrator from any deliberations, nor did they evidence any misconduct. *Ormsbee Development Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982), at p. 1152. "The finality of arbitration weighs heavily in its favor and cannot be upset absent exceptional circumstances." (*Ibid.*) The Petitioner's contention failed "to establish the exceptional circumstances warranting vacation of the award upon the refusal of the district court to hold an evidentiary hearing." (*Ibid.*)

It is noteworthy that Petitioner fails to cite any authority for the proposition that there is a due process

right to an evidentiary hearing and does not even discuss the concept of a deprivation of constitutional rights. Instead, in the argument itself, he asserts that there is a conflict among the circuits on whether an evidentiary hearing is appropriate.

The absence of any argument or authority on the due process issue is understandable because it is not a constitutional question. Petitioner attempted to vacate the arbitration award by a motion filed under the New Mexico Arbitration Act. 668 F.2d at p. 1149. Under that Act, an application to a court to vacate an arbitration award is to be made and heard in the manner provided for the hearing and making of motions. § 44-7-16 NMSA (1978 Comp.). The provision is substantially the same as the comparable provision in the Federal Arbitration Act. 9 U.S.C. § 6. The burden of proof is on the party seeking to vacate the arbitration award. *Saxis S.S. Co. v. Multifacs Int. Traders, Inc.*, 375 F.2d 577 (2d Cir. 1957); *Wright Lumber Co. v. Herron*, 199 F.2d 446 (10th Cir. 1952). The question whether an evidentiary hearing is mandatory on a motion to vacate an arbitration award was decided by the Second Circuit in *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965). There, the unsuccessful party in an arbitration moved to vacate the arbitration award and claimed that the issue raised in its motion should have been determined only after a full hearing with opportunity for oral testimony and cross-examination, and not on motion papers alone. The Second Circuit rejected that argument. Since the matter raised was to be treated as a "motion" under the Federal Arbitration Act, "motions may be decided wholly on . . . papers, and usually are, rather than after oral examination and cross examination of witnesses." 342 F.2d at p. 366. It further stated that a district court, in its discretion, may order a trial-like hearing, but "under the Federal Arbitration Act it is not an abuse of discretion . . . to decline to do so." *Ibid.* See, also, *United Nuclear Corp. v. General Atomic*, 93 N.M.

105, 597 P.2d 290 (1979). The finality of arbitration weighs heavily in its favor and an award cannot be upset except under exceptional circumstances. *Fizer v. Safeway Stores, Inc.*, 586 F.2d 182 (10th Cir. 1978). Courts are justified in exercising great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy and inexpensive process of arbitration, freely chosen by the parties. *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978). Consequently, the policy favoring the finality of arbitration awards militates against making an evidentiary hearing on a motion to vacate an arbitration award a matter of due process and such is not the law.

Furthermore, the Petitioner has not demonstrated any conflict in the circuits on whether an evidentiary hearing must be granted on a claim of non-disclosure by an arbitrator under the *Commonwealth Coatings* decision. There is no such conflict. The only appellate authority relied upon by the Petitioner is *Sanko S.S. Co. v. Cook Ind., Inc., supra*, in which the Second Circuit remanded the case to the district court for an evidentiary hearing. However, even the Second Circuit does not adhere to the view that an evidentiary hearing is always required on a claim of non-disclosure by an arbitrator. As Petitioner acknowledged, in *Cook Ind., Inc. v. C. Itoh & Co.*, 449 F.2d 106 (2d Cir. 1971), *cert. den.*, 405 U.S. 921, (1972), the Second Circuit denied an evidentiary hearing on a claim that the neutral arbitrator's employer had extensive business dealings with one of the parties. It noted that the other party knew, or should have known, or should have expected, in the context of the business involved, that the neutral arbitrator or his employer would have had past business dealings with the other party to the arbitration. The Second Circuit also ruled in *Andros Compania Maritima, S.A. v. Marc Rich & Co., supra*, that it was not error for the district court to deny an evidentiary hearing on a claim that the neutral ar-

bitrator and the president of the successful party had previously served together on nineteen arbitration panels, noting that the movant did not argue that it had demonstrated that the arbitration award should be set aside but only that it was denied a chance to show why this should be done. 579 F.2d at 697. Similarly, the Second Circuit affirmed refusals, without evidentiary hearings, to vacate arbitration awards on the ground of evident partiality in *Reed & Martin, Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971), and *Garfield & Co. v. Wiest*, 432 F.2d 849 (2d Cir. 1970), *cert. den.*, 401 U.S. 940, (1971). Consequently, in attempting to demonstrate some conflict between the Second and Tenth Circuits on whether an evidentiary hearing is necessary on a claim of evident partiality on the part of the neutral arbitrator, the Petitioner has succeeded only in showing that, in the Second Circuit, as in the Tenth Circuit, evidentiary hearings are a matter of discretion and not justified in every case. If the rule were otherwise, there is an "obvious possibility" that a suspicious or disgruntled party could seize upon an undisclosed relationship "as a pretext for invalidating the award." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. at 151; *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d at 700. Thus, in the "special context of what are in effect post hoc efforts to induce arbitrators to undermine the finality of their own awards evidentiary hearings should be limited to situations where clear evidence of impropriety has been presented." *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d at 702. That is not the case here. Petitioner has presented no clear evidence of any impropriety and an evidentiary hearing was properly denied, particularly where, as here, Petitioner's efforts "appear to be yet one more attempt to avoid the consequences of an arbitration upon which [he] insisted." 668 F.2d at p. 1148.

III. THE DISTRICT COURT DID NOT "INTERFERE" IN THE ARBITRATION PROCEEDINGS; PETITIONER'S POINT III PRESENTS NO QUESTION CALLING FOR REVIEW BY THIS COURT.

In his Point III, Petitioner complains that the Court of Appeals allowed the District Court to "interfere" with the arbitration proceedings and, therefore, for some unexplained reason, this Court should "take action to restrict and prohibit the interference of district courts in arbitration proceedings." (Petition, p. 15). Most of the claims presented in Petitioner's Point III were not presented either to the District Court or the Court of Appeals, none of the claims has any merit, and certainly nothing is presented calling for review by this Court on certiorari. Under this point, Petitioner has not even argued that any ruling of the District Court or the Court of Appeals justifies review by certiorari under the parameters set forth in Rule 17.1 of the Rules of this Court.

The first argument raised in Petitioner's Point III is that the District Court should have dismissed Respondent's cross claims against Petitioner in view of the arbitration provision in the leases, rather than staying the proceedings. This point was not raised either in the District Court or the Court of Appeals and, therefore, provides no basis for review by this Court. *See, Ramsey v. United Mine Workers of America*, 401 U.S. 370, 312-13, (1971). Clearly the District Court committed no error in staying the proceedings pending arbitration, and outright dismissal was not required. No determination has been made in this action whether the arbitration was governed by the New Mexico Arbitration Act, § 44-7-1, *et seq.*, N.M.S.A. (1978 Comp.) or the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, or both. The issue is of no moment because of the similarity between the New Mexico Act and the Federal Act. The New Mexico Act in § 44-7-2(B), *supra*, provides for a stay of any action or proceeding if there is an order for arbitration. The Fed-

eral Act, in 9 U.S.C. § 3, has a similar requirement for a stay. In staying the actions, then, the District Court merely complied with the applicable statute. Dismissal would have been erroneous.

Next, Petitioner complains (Petition, p. 12) that the District Court "entered orders regarding discovery during the arbitration process." Again, this point was not presented either to the District Court or the Court of Appeals and cannot form the basis for review in this Court. Moreover, no error was committed by the District Court with respect to discovery in the arbitration proceedings. The parties stipulated on May 19, 1978, in the arbitration that both parties would be entitled to discovery by way of submission of written interrogatories, inspection of documents, and examination or deposition of witnesess. Respondent caused the issuance, from the District Court, of numerous subpoenas for depositions in aid of the arbitration. The New Mexico Arbitration Act specifically provides that subpoenas for attendance of witnesses "shall be served and, upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action." § 44-7-7 N.M.S.A. (1978 Comp.). Numerous federal courts have recognized the propriety of issuance and enforcement of subpoenas by the court which has ordered an arbitration in aid of the arbitration. *See, Steamship Co. of 1949, Inc. v. The China Union Lines, Hong Kong, Ltd.*, 123 F.Supp. 802 (S.D. N.Y. 1954); *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F.Supp. 240 (E.D. N.Y. 1973); *Donahoe v. Susquehanna Colleries Co.*, 49 F.Supp. 843 (M.D. Pa. 1943), *rev'd*, 183 F.2d 3 (3d Cir. 1943), *rehearing*, 66 F.Supp. 588 (M.D. Pa. 1946), *rev'd*, 160 F.2d 661 (3d Cir. 1947); *International Association of Heat and Frost Insulators and Asbestos Workers Local 66, AFL-CIO v. Leona Lee Corp.*, 434 F.2d 192, 194 (5th Cir. 1970). Subpoenas, or orders concerning discovery, issued by the arbitrators do not have the force of law. That is precisely why the

arbitration act and the cases in point permit a court which has ordered arbitration to issue further orders in aid of the arbitration, including orders pertaining to discovery where discovery has been agreed to by the parties, ordered by the arbitrators, or is otherwise proper. The only "orders regarding discovery" entered by the District Court here consisted of an Order (R. II, 464) denying the Motion of Defendants Michael and Corinne Grace for a Protective Order Quashing Subpoenas for the Depositions which Petitioner had agreed could be taken in the Stipulation for Discovery, and an Order allowing the taking of the deposition of Corinne Grace (R. II, 485) who was then incarcerated in a federal correctional institution in California. Clearly, no error was committed by the District Court in issuing these Orders in aid of the arbitration, as was recognized by Petitioner's former attorneys by their not having complained of such Orders either in the District Court or the Court of Appeals.

Petitioner next contends (Petition, p. 12) that the District Court "directed that the arbitration hearing proceed despite the illness of Petitioner at the commencement of the arbitration hearings." This seriously misrepresents the record. The first Opinion of the District Court (R. III, 717; *see*, App. D to Petition) points out that when the arbitrators finally scheduled the hearing on the merits in the arbitration almost two years after the Order directing arbitration, due principally to delays caused by Petitioner (R. III, 718), Petitioner changed his attorneys two weeks prior to the scheduled hearing and sought a continuance on that basis. Over Respondent's objection, a continuance was granted but only upon the promise of Petitioner's new counsel that no more continuances would be sought. The District Court found this demand to the arbitrators "completely reasonable for there had been nearly a two-year lapse since this Court had stayed proceedings pending arbitration and nearly three years since the first arbitration demand had been made." (R. III, 729). When the rescheduled arbitration hearing began,

Petitioner was absent for the first five days of the two and one-half week hearing because of emergency surgery. However, as the District Court found, "no demand for relief from his prior promise or for a continuance was made by counsel." (R. III, 729). Thus, the District Court did not direct that the arbitration proceed despite the illness of Petitioner; no request for a continuance was made either of the arbitrators or of the District Court. Moreover, as the District Court found (R. III, 729-30), the portion of the arbitration hearing which Petitioner missed consisted of the presentation of his own case, Petitioner did appear to testify on his own behalf, and was present throughout the presentation of evidence by Respondent. As the District Court further found, the claim that the arbitration should not have proceeded because Petitioner was absent for the first few days of the hearing is "completely without merit." (R. III, 729). Again, this was recognized by Petitioner's former attorneys, as this point was not raised in the Court of Appeals.

Petitioner also complains of the District Court's statement (Petition, p. 12) that the District Court was reconsidering its decision to order arbitration and was considering abolishing the Stay Order. This comment was made during the hearing on the Motion by Petitioner seeking to quash the subpoenas which had been issued in aid of taking the depositions which he had agreed to and which the arbitrators had ordered to be taken. The result of the hearing was the Minute Order of February 1, 1979 (R. II, 464) denying Petitioner's Motion for a Protective Order. Even if the District Court had abolished the Stay Order, such action would have been proper by reason of Petitioner's numerous delays in the arbitration (R. III, 718) which the District Court very well could have found constituted a waiver of the right to arbitrate or a "default in proceeding" with the arbitration. *See*, 9 U.S.C. § 3; *Reid Burton Constr. Inc. v. Carpenters Dist. Council, etc.*, 614 F.2d 698 (10th Cir. 1980), *cert. den.*, 449 U.S. 824, (1980); *Commercial*

Iron & Metal Co. v. Bache Halsey Stuart, Inc., 581 F.2d 246 (10th Cir. 1978), *cert. den.*, 440 U.S. 914, (1979). However, the District Court did not lift the Stay Order, but allowed the arbitration to proceed, and in fact did not grant Respondent's Motion to Lift the Stay Order (R. III, 487). The fact that the District Court, in expressing its exasperation at Petitioner's efforts to delay the arbitration proceeding, stated that it was considering lifting the Stay Order presents no question for review by this Court, and was not even made the basis of any point urged by Petitioner in the District Court or the Court of Appeals.

Finally, Petitioner contends (Petition, p. 13) that the District Court erred in ordering Petitioner to dismiss his second demand for arbitration, filed in California after the District Court had confirmed the New Mexico arbitration award. This "second bite at the apple" was the subject of a separate appeal before the Tenth Circuit, numbered 81-1161. The second demand for arbitration filed in California on November 14, 1980 (four months after Petitioner had appealed confirmation of the New Mexico arbitration award to the Tenth Circuit), made three claims:

1. That Respondent was unjustly enriched as a result of Petitioner's expenditure in exploring the leased properties for uranium;

2. That Respondent owed a duty to Petitioner to submit an offer by Gulf to accept an assignment of Petitioner's leases; and,

3. That the arbitrators in the New Mexico arbitration had a duty to examine and admit into evidence "similar leases" between Respondent and other lessees.

All of these issues were litigated in the New Mexico arbitration. Petitioner's claims of "unjust enrichment" were argued, and evidence offered concerning them, in the New Mexico arbitration (R. VI, 12-13; R. X, 832);

and, the only Memorandum Brief submitted by Petitioner's counsel to the arbitrators was entitled "Memorandum Brief—Unjust Enrichment."

One of the principal grounds urged by Petitioner in the District Court and the Court of Appeals for vacation of the New Mexico Arbitration Award was his claim that the arbitrators refused to consider or admit in evidence "similar leases". This claim was soundly rejected by both Courts. It is difficult to imagine how an arbitration panel in California could determine that the arbitrators in New Mexico had "breached duties" to Petitioner in refusing to hear evidence concerning "similar leases" after the District Court and Court of Appeals found that the arbitrators had in fact considered the evidence and, in any event, had not acted improperly in refusing to hear any evidence.

The claim that Respondent refused to submit an offer from Gulf was likewise litigated in the New Mexico arbitration. In fact, Respondent simply referred Gulf to Petitioner, and Gulf then unsuccessfully negotiated with Petitioner for an assignment of the leases. (R. X, 852, 941; R. XI, 1105; R. XII, 1413-37; R. XVI, 2105-06). The District Court and Court of Appeals were clearly correct in ruling that the matters presented by the California arbitration were barred by *res judicata*. *Box v. Rundell*, 179 F.2d 626 (10th Cir. 1950); *Katzburg v. Krebs*, 545 F.2d 104 (10th Cir. 1976); *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (App. 1975), *cert. den.*, 87 N.M. 450, 535 P.2d 657 (1975). *Overseas Motors, Inc. v. Import Motors, Ltd.*, 375 F.Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975), *cert. den.*, 423 U.S. 987, (1975), relied upon by Petitioner (Petition, pp. 13-14), actually supports the conclusions of the District Court and Court of Appeals that the arbitration award and its confirmation barred Petitioner's second attempt to arbitrate the same issues in California. And, Petitioner does not even bother to attack the rulings of the Court of Appeals that the District Court had the

power to order Petitioner to dismiss the California arbitration in aid of the appeal from the judgment confirming the arbitration award, and that the issues sought to be arbitrated in California, even if they had not been arbitrated in New Mexico, would be waived by failure to assert them in the earlier New Mexico arbitration. 668 F.2d at 1152-53.

In summary, Petitioner's Point III is a hodge-podge of arguments, most of which were never presented to the District Court or Court of Appeals, is clearly without merit and presents no question worthy of review by this Court.

IV. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS CONDEMNED SOLUTION MINING; THE ARBITRATORS PROPERLY HELD THAT PETITIONER HAD FAILED TO ACHIEVE PRODUCTION OF URANIUM IN COMMERCIAL QUANTITIES.

Petitioner's Point IV argues that the District Court and Court of Appeals held that solution or "in situ" mining of uranium could not qualify as "commercial production." This is a gross misstatement of the record. Although evidence presented at the arbitration hearing indicated that solution mining was not contemplated by the subject leases, and Petitioner's own witnesses considered it an inappropriate method of mining, possibly injurious to the property (R. IX. 735-36, R. XV 2038-40), the record of the arbitration hearing, the award, and the proceedings leading to its confirmation all make clear that the basis of the award was Petitioner's failure to achieve production in commercial quantities, and not any holding that solution mining *per se* was improper or could not produce uranium-bearing ore in commercial quantities.

The "commercial quantities" or "paying quantities" test, limiting the term of a mineral lease, is familiar throughout the mineral industry. Contrary to Petitioner's statement that only "some oil and gas leases" use the

term (Petition, p. 16), such a limitation upon the term of a mineral lease is used almost universally where leases or estates are not granted for a specific term of years. Use of such terms in habendum clauses of mineral leases has been recognized by "a vast majority of the courts" as conveying an interest subject to a special limitation, *i.e.*, lack of production in commercial or paying quantities at the end of the primary term results in an automatic termination of the lessee's interests. 3 H. Williams, Oil and Gas Law, 36-38 (1978); *Vernon v. Union Oil Co. of Cal.*, 270 F.2d 441 (5th Cir. 1959); *Reese Enterprises Inc. v. Lawson*, 220 Kan. 300, 553 P.2d 885 (1976). This Court has previously recognized such usage of the terms. *See Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 277-78, (1934). *See, also, Andrus v. Shell Oil Co.*, 446 U.S. 651, (1980). The construction by a majority of the courts—as an automatic limitation or termination of the lessee's estate if production in commercial quantities has not been achieved by the end of the primary term

> "seems in accord with the intent of the parties and sound policies . . . the special limitation placed on the duration of the lessee's interest is not a frivolous collateral condition or a whimsical limitation on the use of the interest.
>
> * * * *
>
> Rather, the basis of the majority rule is that the parties to the lease intended that a lessee should not be permitted to hold a lease after the expiration of the primary term for speculative purposes only."

3 H. Williams, *supra*, at pp. 38, 60. While reported cases construing "commercial" or "paying" quantities most often involve oil and gas leases, it has been recognized that the construction of such terms by those courts is applicable to similar usages of the terms as limitations upon a lessee's estate in other mineral leases, including uranium leases. *See*, T. Greene, *Conveyancing Problems in Uranium Mining Rights*, 5 Utah Law Review, 29, 41 (1956); *Smith v. Holmes*, 181 Kan. 438,

312 P.2d 228 (1957); *Treasure City v. Mountain States Clay Products*, 132 Mont. 12, 313 P.2d 1028 (1957). New Mexico has recognized that principles of construction applicable to oil and gas leases are likewise applicable to similar terms found in other mineral leases. *Darr v. Eldridge*, 66 N.M. 260, 346 P.2d 1041 (1959). The United States has frequently used the terms "commercial quantities" or "paying quantities" in statutes and regulations as limiting the term of oil and gas and other mineral leases. *See, e.g.*, 25 U.S.C. § 396(a); 25 U.S.C. § 398; 30 U.S.C. § 187(a); 30 U.S.C. § 226-1; 43 U.S.C. § 1337; 15 U.S.C. § 3312.

The "commercial quantities" or "paying quantities" test means, as Petitioner admits, that production must at least "pay its way," or produce revenues in excess of costs of production. (Petition, p. 16.) Discovery alone does not constitute "production" in commercial or paying quantities. 3 H. Williams & C. Meyers, Oil and Gas Law, § 604.1 at 42.4; *Greer v. Salmon*, 82 N.M. 245, 479 P.2d 294 (1970). Production in "commercial quantities" requires a quantum of minerals produced sufficient to pay operating costs plus some profit. *Greer v. Salmon, supra*; *Champion Ventures, Inc. v. Dunn*, 567 P.2d 724 (Wyo. 1977); 12 W. Sommers, The Law of Oil and Gas, § 306 at pp. 335-36 (1959); 3 H. Williams & C. Meyers, Oil and Gas Law, § 334.7 (1977); Meyers, Habendum Clauses in Term Mineral and Royalty Deeds, 6 Rocky Mountain Mineral Law Institute 551, 603-09 (1961); *Annotation*, "Meaning of Paying Quantities in Oil and Gas Lease," 43 A.L.R.3d 8 (1972). Almost without exception, the witnesses testifying at the arbitration agreed with this interpretation as applicable to the uranium mining industry in the area of the subject leases. (R. VII, 706; R. VIII, 997; R. IX, 1130-33; R. XI, 1539-40, 1697-98; R. XII, 1748-1813; R. XIII, 1981-2023, 2034-52). Contrary to Petitioner's contention (Petition, p. 16), the Federal Energy Regulatory Commission has not concluded that "production in commercial quantities has occurred if natural gas has been sold and delivered." To

the contrary, the FERC, in 18 C.F.R. § 271.204(C), defined "commercially producible" as requiring a completed well which "can reasonably be expected to produce natural gas in quantities sufficient to yield revenues in excess of operating costs." The portion of the regulation cited by Petitioner actually states that a rebuttable presumption exists that production in commercial quantities has not occurred if natural gas has not been sold. Likewise, *Rummell v. Bailey*, 7 Utah 2d 137, 320 P.2d 653 (1958), relied upon by Petitioner (Petition, p. 32), did not deal with the issue of extension of the term of a mineral lease by production in commercial or paying quantities. Rather, that case involved the test of "discovery" of a valuable mineral under 30 U.S.C. § 23. It has been specifically recognized that a valuable mineral may have been "discovered" even though the deposit may not contain ore "in paying quantities." *Chrisman v. Miller*, 197 U.S. 313, (1905). *See, also, Andrus v. Shell Oil Co.*, 446 U.S. 651, (1980). As noted above, most courts considering the question, including New Mexico, have held that a mere "discovery" of a valuable mineral does not amount to production in commercial quantities so as to extend the term of the lease. *Greer v. Salmon, supra.*

Petitioner's "production" at his three last-minute "mining" operations fell woefully short of commercial production under any definition of that term. The pit mining operation produced total revenues of $62 which did not even pay the cost of transporting the ore "mined" from the lease site to the mill. One of the solution mining operations produced $4,134 in revenue against expenses of over $45,000, and the other produced revenues of $652.24 against costs in excess of $25,000. Clearly, the arbitrators ruled properly in holding that Petitioner was not "producing uranium-bearing ore in commercial quantities" from the leases and that the leases had automatically terminated. This ruling resulted simply from Petitioner's own failure to achieve production in commercial quantities, not from any condemnation by the

arbitrators, the District Court, or the Court of Appeals of "in situ" or "solution" mining.

Petitioner's argument in Point IV again was not presented to the District Court or Court of Appeals. The definition of "commercial production" applied by the arbitrators comports with the rule followed by the vast majority of courts in the United States. Far from discouraging production of needed natural resources, use of the "commercial" or "paying" quantities test as limiting the term of mineral leases, and the definition of that test applied by the courts, encourages resource production. As noted in 3 H. Williams, Oil and Gas Law, 60 (1978), the majority rule is founded upon the proposition that a lessee should not be permitted to hold a lease, without production, after expiration of the primary term for speculative purposes only. *See, also, Town of Tome Land Grant Inc. v. Ringle Development Co.*, 56 N.M. 101, 105, 240 P.2d 850, (1952). The majority definition of "commercial production" applied by the arbitrators here actually encourages rapid development of needed natural resources. In any event, none of the rulings of the arbitrators, the District Court, or the Court of Appeals present any question calling for review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that Petitioner's writ of certiorari should be denied.

Respectfully submitted,

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July 26, 1982

STATUTORY APPENDIX

STATUTORY APPENDIX

9 U.S.C. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

9 U.S.C. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the pro-

ceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

Title 44, N.M.S.A. (1978 Comp.):

44-7-2. Proceedings to compel or stay arbitration.

* * * *

B. On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

* * * *

44-7-3. Appointment of arbitrators by court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

44-7-7. Witnesses; subpoenas; depositions.

A. The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books,

records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

B. On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

C. All provisions of law compelling a person under subpoena to testify are applicable.

D. Fees for attendance as a witness shall be the same as for a witness in the district court.

44-7-12. Vacating an award.

A. Upon application of a party, the court shall vacate an award where:

• • • •

(2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

• • • •

44-7-16. Application to court.

Except as otherwise provided, an application to the court under the Uniform Arbitration Act [44-7-1 to 44-7-22 NMSA 1978] shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.